United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75 4021

In the

UNITED STATES COURT OF APPEALS
For the Second Circuit

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS (No. 75-4021); WARNER BROS. INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA INC. and TWENTIETH CENTURY-FOX TELEVISION (No. 75-4024); SANDY FRANK PROGRAM SALES, INC. (No. 75-4025); WESTINGHOUSE BROADCASTING COMPANY, INC. (No. 75-4026),

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Respondents,

NATIONAL BROADCASTING COMPANY, INC., et al.,

Intervenors.

BRIEF OF PETITIONERS WARNER BROS. INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA INC., TWENTIETH CENTURY-FOX TELEVISION and INTERVENORS NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS and LORIMAR PRODS.

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Preliminary Statement

Petitioners Warner Bros. Inc., Columbia Pictures Industries, Inc., MGM Television, United Artists Corporation, MCA Inc. and Twentieth Century-Fox Television and intervenors National Committee of Independent Television Producers and Lorimar Prods. request this Court to invalidate the Federal Communications Commission's prime time access rule (PTAR), which has been recast in the agency's Report and Order of

January 17, 1975, FCC 75-67 (Docket No. 19622) (32 P & F Radio Reg. 2d 697).

Three of the seven Commissioners voiced objections to continuing PTAR because it has decreased program diversity for viewers for four years, contrary to its original goal. But the majority was willing to continue the rule provided that it could be propped-up by new and detailed program regulations. Those new regulations, as shown below, have the effect of setting up classifications of preferred and taboo programs. For example, the new rules will, in effect, prefer Lawrence Welk but ban Lassie. My Fair Lady will be banned; Tugboat Annie will be permitted. Bowling for $$ will be encouraged; The Ten Commandments will be contraband.

This form of censorship, totally arbitrary on its face, is clearly impermissible under the First Amendment, the Equal Protection Clause and the Communications Act. That these programming directives have now become the very foundation of the rule is shown by the fact that the majority of the Commission has warned that it will repeal PTAR unless this Court legitimatizes such censorship.

Moreover, wholly apart from these blatant First Amendment violations, the original PTAR concept has proven unconstitutional and counter-productive in four years of practice.

Although originally passed in 1970 to increase diversity of programming, the FCC itself concedes that it has decreased diversity.

Although originally passed to decrease network dominance, it has increased that dominance so that at least two networks now support the rule.

All in all, the FCC's unprecedented PTAR experiment has backfired. The undisputed statistics as to the composition of syndicated access programming for early evening viewers over the past four years tell their own story:*

	1970-71 (before PTAR)	1971-72	1972-73	1973-74	1974-75
Game shows	11%	23%	49%	55%	66%
Dramas	46	28	17	12	5
Comedies	22	19	2	7	0.5

In light of those statistics, the FCC conceded last year before this Court that PTAR has created "the present reality of a deteriorating diversity in programming" and that "the disappointing fact is that [PTAR] has not resulted in diversity of program choices to the public."** Those admissions, without more, show that PTAR tramples the public's

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* Based on FCC's 1974 Report for the 1970-71 through 1973-74 seasons (44 F.C.C.2d 1081, 1153). The figures for the current 1974-75 season were prepared on the same basis as the FCC's figures for the earlier years (A 420). (References to "A", followed by the appropriate page, are to the Appendix filed with this brief.)

** FCC April 1, 1974 Brief (at 18, 25) in NAITPD v. FCC, 502 F.2d 249 (2d Cir. 1974).

First Amendment rights to a diversity of program choices.

STATEMENT OF ISSUES FOR REVIEW

I. Does the basic PTAR rule violate the First Amendment and the public interest in the light of four years' experience?

II. Does the new classification system of preferred and taboo programs violate the First Amendment, the Equal Protection Clause and the anti-censorship provisions of the Communications Act?

III. Do the motion picture and off-network bans violate the First Amendment, the Equal Protection Clause and the Communications Act?

IV. Has the FCC failed to meet its statutory mandate to curb network dominance?

V. Do the FCC's new purported rationales for continuing PTAR fail to solve the rule's serious First Amendment problems and other adverse consequences, contravene the agency's statutory mandate and present other significant errors of law?

VI. Does the FCC's present decision violate the Administrative Procedure Act?

Statement of Background Facts

Since this Court is familiar with the background facts as the result of two prior appeals in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), and NAITPD v. FCC, 502 F.2d 249 (2d Cir. 1974), we shall describe them only briefly.

The Parties

Petitioners Warner, Columbia, MGM, UA, MCA and 20th Century produce motion pictures and television programming of network calibre. Several have also produced programs for use by stations in access time periods.* Intervenor NCITP represents a group of more than 70 independent producers of television programs who, unlike some of the petitioners, lack their own studio or distribution facilities. They include a wide cross-section of producers who have created some of the nation's most popular network television programs. Intervenor Lorimar is a producer member of NCITP.

Petitioner NAITPD represents a group of 13 producers who specialize in game shows for access periods and network daytime. Their game shows today fill more than 55% of access

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* 20th Century, Columbia, MGM and MCA have produced a dozen access programs, including several successful game shows (Beat the Clock, Dealer's Choice, Diamond Head and Masquerade Party).

time devoted to syndicated entertainment (A 376). Petitioner Frank produces two game shows. Petitioner Westinghouse, a large multiple-station owner, originally produced some access programs. But they could not compete against the less expensive game shows and so Westinghouse abandoned access production.

Prior Proceedings

PTAR I

In 1970, the FCC passed PTAR I to encourage diversity and decrease network dominance (23 F.C.C.2d 382). PTAR I prohibited network affiliated stations in the top 50 markets from carrying network programs for more than three of the four hours of prime time (7 to 11 PM) or from using the cleared time for "off-network" programs (programs that had previously appeared on a network) or motion pictures broadcast within the prior two years in a market. In practice, access time became 7 to 8 PM on week nights and, generally, 7-7:30 and 10-10:30 PM on Sundays.

This Court in Mt. Mansfield was willing to allow the FCC to try this experiment on the basis of the Commission's predictions that it would increase diversity for the public. But the Court recognized that there were uncertainties about those predictions and substantial First Amendment questions. It thus cautioned that it would reconsider these Constitutional issues if the rule in practice reduced diversity (442 F.2d at 477-79).

PTAR II

That is precisely what happened. PTAR decreased diversity. It also increased network dominance. As a result, in 1972 the FCC instituted a new rule-making proceeding to reconsider the fate of PTAR. Thereafter, in 1974 a sharply divided FCC (with two of the seven Commissioners urging repeal and a third expressing serious reservations) continued PTAR in a brand new form (44 F.C.C.2d 1081). Because of the rule's reduction of diversity for the public and its other adverse consequences, the FCC reduced access time from 14 to 6 half-hours per station. In particular, PTAR II eliminated access time on Sunday, cut it in half on other nights (specifically pegging the access period at 7:30-8 PM); provided that one of the remaining six access half-hours could be used for network or off-network children's programs, documentaries or public affairs programs; and purported to relax the restriction on motion pictures.

But PTAR II, scheduled to take effect September 1974, never became operative. In the NAITPD case, this Court ruled that the FCC had not given sufficient advance notice for the new rule and remanded. While not passing on the First Amendment or other issues on the merits, the Court urged the FCC to take a fresh look at PTAR and was highly critical of the Commission's treatment of this matter in numerous respects.

At the very outset of its NAITPD opinion, this Court stressed that in Mt. Mansfield, "we recognized the experimental nature of the rule and warned that our holding did not preclude a further review of experience with the rule if it proved to be inimical to the public interest" (502 F.2d at 252).

The Court also emphasized that the FCC "must place the public interest above private interests" and "identify the public interest basis for its action" (at 257):

> "These dictates should apply with even greater force where the Commission's conduct has as broad an impact on the public as the Prime Time Access Rule. The rule directly affects what millions of Americans watch on television for an hour every night and, indirectly, may affect all prime time programming."

The Court indicated that the FCC had not given sufficient consideration to PTAR's impact on the nation's millions of viewers but, instead, had reached "an impermissible compromise" between competing private broadcasting interests (at 258 & n.15).

The Court was also particularly critical of the FCC's unexplained disregard of its Economist's Report (the Pearce Report, A 164-331), which concluded that PTAR has increased network dominance contrary to its intent. In this connection, the Court stressed that "the nation's policy favoring competition is one which the FCC must incorporate in regulating the broadcast media" (at 256).

PTAR III

Thereafter, the FCC solicited comments dealing with the questions raised by the Court. In November 1974, the FCC issued a Public Notice announcing PTAR III. It issued its final Report on January 17, 1975. That Report, scrapping the stillborn PTAR II, contradicts virtually every important conclusion reached by the FCC in its 1970 Report (PTAR I) and 1974 Report (PTAR II).

The new rule adopted by the Commission, PTAR III, fully restores access time to 14 half hours per station, despite the fact that deterioration in diversity has steadily worsened every year since 1970. PTAR III bans from access time all motion pictures which ever appeared on a network. It reimposes the "off-network" ban for the full 14 half-hour periods. The new rule, however, allows stations to use access time for network and off-network children's programs, public affairs and documentaries, provided that they are kept at a "minimum" consistent with the public interest and never broadcast on Saturday night in the absence of "compelling" need (¶¶ 28, 34).* Finally, there are exceptions for certain sports events and undefined "truly special" or "unusual" network programs of four hours duration, provided that they are not motion pictures (¶¶ 2, 55).

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* All paragraph references ("¶") herein, unless otherwise indicated, are to the Report and Order released January 17, 1975, FCC 75-67 (Docket No. 19622).

Under these new rules, as explained in the Commission's Report and in light of marketplace realities, there will be a labyrinth of preferred and disfavored programs for access time. For example, as shown below (pp. 27-28), stations are encouraged to set aside Saturday nights for Lawrence Welk and Hee Haw, and to cancel last year's plans for children's specials, documentaries and public affairs programs. Stations may show unpopular motion pictures in access time that never played on the networks but not popular pictures that did play. Thus, films like Sound of Music and A Man For All Seasons are banned in access. Game shows are encouraged, but Lassie is not allowed. And stations may use access time to a "minimum" extent (but never on Saturday) for certain network or off-network children's programs (The Wonderful World of Walt Disney is approved but probably not Black Beauty), for those documentaries which the FCC evaluates as "educational", and for some public affairs. It is difficult to imagine more offensive or arbitrary program censorship and impermissible classifications under the First and Fourteenth Amendments.

PTAR was continued by only a narrow margin. Thus, three of the seven Commissioners indicated a preference for repeal. Commissioner Robinson wrote a lengthy dissent in which he referred to access programming as "embarrassing" and warned of the First Amendment problems of program classifications (at

4, 16-17, 24, 30). Chairman Wiley and Commissioner Reid concurred in the majority opinion. The Chairman stated:

> "I concur reluctantly in this latest revision of the prime time access rule. I have never been a great admirer of the rule primarily because I believe that it tends to involve the Commission too deeply in decisions which traditionally have been left to the marketplace. Moreover, as I see it, our experience to date with prime time access has not been encouraging in terms of fulfilling its stated objectives."

In a similar vein, Commissioner Reid reluctantly concurred as she had last year in connection with PTAR II. Then, she stated: "I believe that the total repeal of the rule would have been much more in the public interest .... Since the compromise evidenced by this document [PTAR II] seemed to be the closest to total repeal that could be obtained, I decided to concur in its adoption" (44 F.C.C.2d at 1173). Now, Commissioner Reid states: "I would hope, even expect, that we would not reenact this rule unless it is for the purpose of repealing the PTAR .... I am still not convinced that the rule really is in the public interest."

I

THE BASIC PTAR RULE VIOLATES THE FIRST AMENDMENT AND THE PUBLIC INTEREST

In Mt. Mansfield, this Court affirmed PTAR on a limited basis -- (a) as an experimental rule; (b) by temporarily deferring to the FCC's predictions that it would increase diversity; and (c) with a caveat that the FCC's predictions were subject to review by the Court in the light of actual experience. But now the FCC admits that PTAR has caused a decrease in diversity of program choices for millions of Americans for four years. But it claims that diversity of program choices may not be all that important after all and that, in any case, there is no slide-rule to measure this with exactitude. The FCC, in effect, disavows the original goals of the rule and now seeks to justify it for totally different reasons, including inter alia greater profitability for certain broadcasters. The rule has frustrated its goals and injured viewers -- it cannot be continued because of benefits to private interests.

It has long been recognized that the broadcast medium is "included in the press whose freedom is guaranteed by the First Amendment", United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). In light of this First Amendment protection, the Supreme Court recently noted that for "nearly a half century [the] unmistakeable congressional

purpose [has been] to maintain -- no matter how difficult the task -- essentially private broadcast journalism held only broadly accountable to public interest standards." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 120 (1973) (hereinafter CBS v. DNC).

This Court in Mt. Mansfield recognized that the PTAR experiment was fraught with serious and novel First Amendment questions. However, it was willing to allow the FCC's test, which restricted the free speech rights of broadcasters, producers and viewers, in light of the Commission's forecasts that the overall diversity of programs for the public would be enhanced. The FCC had repeatedly predicted that this would take place (23 F.C.C.2d 382, 396-97, 400; 25 F.C.C.2d 318, 325-26). Other parties vigorously challenged the Commission's predictions. This Court observed in Mt. Mansfield that the success of PTAR "is difficult to predict" (at 483) and pointed to the FCC's own qualification that this question "cannot be determined with absolute certainty short of some operational experience under competitive conditions" (23 F.C.C.2d at 396; emphasis added).

This Court indicated in Mt. Mansfield that, in view of the uncertainties of the rule's effect when tried in practice and the grave First Amendment issues, it was giving PTAR only conditional approval:

> "'[I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.'" (442 F.2d at 479, quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969)).

This Court repeated that warning in the NAITPD case last year:

> ". . . we recognized [in Mt. Mansfield] the experimental nature of the rule and warned that our holding did not preclude a further review of experience with the rule if it proved to be inimical to the public's interest" (502 F.2d at 252).

The PTAR experiment has now had more than what the Commission termed "some operational experience". It has been in effect for four television seasons. But, contrary to its original hopes in 1970, the FCC last year candidly admitted before this Court in the NAITPD case that PTAR had created "the present reality of deteriorating diversity in programming" and that "the disappointing fact is that this [PTAR] has not resulted in diversity of program choices to the public".*

Those statements are borne out by the undisputed statistics in the chart set forth above (p. 3) describing the composition of the syndicated programs which fill the vast bulk of access time. As shown there, in steady annual quantum

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* FCC Brief, April 1, 1974, at 18, 25.

leaps over the past four years, game shows have increased from 11% to 66%, whereas varied dramas have declined from 46% to 5% and diversified comedies have declined from 22% to 0.5%.

The FCC's 1974 Report (adopting PTAR II which reduced access time from 14 to 6 half-hours) made detailed findings about this decrease in diversity. The FCC found that PTAR "represents singularly little in the way of opportunity for the development of really new syndicated material" because "stripped [broadcast five times a week] game shows have increased their share of time" in place of dramas and comedies (44 F.C.C.2d at 1132); that "there is very little benefit accruing from this period [7 to 7:30 P.M.] to the cause of promoting really new non-network programming" (at 1133); that there is a "small contribution which these hours make to the development of really new material" (at 1133); and that PTAR has had a "mediocre showing" (at 1137) which "can hardly be called distinguished" (at 1138).

The Commission emphasized that it had grounds for serious concern, including "the stripping of programs (generally game shows) in the 7:30 period(compared to the variety of network material presented there in 1970 and before)" (at 1138); and that "[t]his is particularly true. . . in markets where all

three affiliated stations strip game shows at the same time" (at 1138, n. 40). The FCC added:

> ". . . [T]he greatly increased use of game shows itself can hardly be regarded as a favorable result of the rule, not necessarily as such but in view of the extent that these are either stripped in prime [sic -- "access"] time or represent 'sixth episodes' of game shows made for network daytime stripping. There has been a corresponding decline in other categories of programming, such as drama, and much of what there is is foreign product. . ." (at 1138-39).

The FCC found that in access time "a great deal of material is revivals or continuations of foreign [sic -- "former"] network series, or, in the case of some successful game shows such as Let's Make a Deal, The Price Is Right and Hollywood Squares, 'sixth episodes' of programs currently stripped on the networks on weekdays" (at 1154).*

The FCC's 1974 Report found that viewers in many markets were limited exclusively or primarily to game shows in access time because all or most of the local stations were presenting them simultaneously (at 1138 & n. 40, 1156). That is significant because most localities, unlike New York and other large cities, do not have more than three VHF stations. Indeed, only 14 of the top 50 markets have more

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* The FCC repeated these findings as to lack of diversity in denying reconsideration of PTAR II (29 P & F Radio Reg. 2d 1715, 1732-34).

than three commercial VHF stations (23 F.C.C.2d 382, 385). Thus, viewers in markets with only three stations -- all presenting games in access time -- have extremely limited choices.

The overwhelming glut of game shows in the access period is not surprising. On the contrary, it is the predictable and direct result of economics of the first-run syndication market under PTAR. As the Pearce Report found (A 174-75, 233-35, 276-80), game shows predominate because they are the least expensive form of program to produce ($5000 to $10,000 per episode) and stations can license them at low rates and insert almost double the number of commercials that appear in the network shows they replaced (approximately six rather than about three minutes per half hour). In contrast, production costs of dramatic and comedy programs of network quality are as high as $125,000 to $150,000 per half hour and cannot -- and have not been -- supported by the first-run syndication market under PTAR. Indeed, to the extent that some producers (such as Westinghouse) attempted to make dramas and comedies for access syndication at lower budgets ($40,000 to $60,000), they found that these programs could not compete against the less expensive game

shows.* And as a result, dramas and comedies have virtually disappeared from access time. Indeed, petitioner Westinghouse, which originally proposed PTAR, conceded in hearings before the FCC in 1973 that PTAR did not "accomplish more diversity in programs", and it abandoned production of syndicated programs for access after two years.**

In the current television season (1974-75), following the issuance of the FCC's 1974 Report, there has been a further deterioration of diversity (supra, p. 3). Today, in one-half of the top 50 markets covered by PTAR, viewers are limited primarily or exclusively to game shows (A 373). And 25% of access game shows now are merely sixth or seventh episodes of current stripped daytime network shows (A 373). Moreover, plans for the forthcoming television season (1975-76) disclose a further decrease in diversity according to Daily Variety, February 13, 1975:

> "The network O & O stations have already just about recompleted renewals and buying for next season's prime-access slots, and the new lineups reflect a sharp swing away from nature shows and a heaping on of more games."

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* A 53-54, 495, 521.

** FCC Hearing Transcript, July 31, 1973, at 486-87.

The public has understandably registered a strong negative reaction to this erosion of program variety. Thus, as found by the Pearce Report (A 248-50) and pointed out in Commissioner Robinson's dissent in the 1975 Report (at 21), during the access period viewers tend to switch from affiliated stations limited to access fare to independent stations not subject to PTAR, if such independent stations are available in their communities. The nation's leading television critics have also uniformly decried the decrease in diversity caused by PTAR (see Appendix A included herein).

The FCC's present Report, adopting PTAR III, totally contradicts the findings of the Commission's 1974 Report and the FCC's own admission before this Court last year that PTAR created "the present reality of deteriorating diversity in programming".* Indeed, the Commission in effect disavows the very purposes of the rule and this Court's rationale in Mt. Mansfield:

(1) In what is probably the crux of its new opinion, the FCC inexplicably states as follows about the key issue of diversity (¶ 20):

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* FCC Brief, April 1, 1974, at 18 (in NAITPD).

> "Perhaps more fundamental is the question of to what extent repeal or really substantial abridgement of the rule would be justified on the basis of a Commission evaluation of such matters. Action on a basis like this has the danger of reflecting the Commission's personal predilections and prejudices. A related question is, assuming such an inquiry is appropriate, what standards should be used, and whether they should be applied, in a sense, retroactively and without any public input into their formulation.*

That legal rationale, standing alone, requires repeal of PTAR.

The FCC passed PTAR tc promote diversity. This Court upheld it on the basis of the FCC's predictions of diversity. Last year, the FCC told this Court the rule decreased diversity. The Commission cannot now profess its inability to gauge diversity. If it cannot measure diversity, it should not have passed the rule in the first place.

Contrary to its present claims about the propriety and perplexity of gauging diversity, the FCC had no such difficulty last year in its 1974 Report or in its statements to this Court. The determination of diversity, as Commissioner Robinson points out in his dissent (at 17 & n. 2), rests on objective facts and undisputed statistics -- namely, that game shows have increased from 11% to 66% of access syndicated time, whereas dramas and comedies decreased from 46% to 5% and from 22% to 0.5%. Any viewer at home has no difficulty in determining

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* At another point, the FCC questions whether "a judgment is ever appropriate" as to diversity (¶ 16).

the issue of diversity when his TV menu is limited to a steady diet of simultaneous game shows almost every night.

Having promised in 1970 to take immediate remedial action if the experimental PTAR did not produce diversity (23 F.C.C.2d 382, 396-97, 401), the FCC cannot now claim impotency in the light of PTAR's four-year record.

The Commission's present rationale in walking away from this critical issue of diversity is an abdication of its statutory duty and, without more, requires a reversal of its decision to continue PTAR.

(2) The FCC now also suggests that perhaps diversity of choices for millions of American viewers may not be all that important after all. It thus rationalizes that alternate sources of programs was the major objective of PTAR, whereas "diversity of programs was a hope, rather than one of the primary objectives" (¶ 14). But in the first place, the FCC proposed both objectives in 1970 and 1972.* Second, last year the FCC rejected the identical claim (by a game show entrepreneur that it should be concerned only with

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* 23 F.C.C.2d 382, 394-95, 397, 400, 424; 25 F.C.C.2d 318, 326; 37 F.C.C.2d 900, 909.

sources and not with diversity of programs.* Third, as Commissioner Robinson points out in his dissent (at 17 & n. 2), an increase in sources but a decrease in program choices hardly serves the interest of millions of viewers at home. Fourth, there has been no increase in sources -- a fact found by the FCC in its 1974 Report (44 F.C.C. 2d at 1139) and by its Economist.** Finally, whatever the FCC's new professed view of its original goals, the First Amendment sets up its own standards which take precedence. A rule that erodes diversity of choices for viewers and at the same time also restricts the free speech rights of broadcasters, producers and other creative talent surely violates the First Amendment.

(3) Finally, the FCC seeks to explain away the erosion of program diversity by the facile excuse that

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* On reconsideration of its 1974 Report, the FCC last year specifically rejected the view that program diversity did not matter and that its only concern was with alternate sources of supply. It declared that such an argument attached "unwarranted weight" to the question of sources and added:

> ". . . the idea that we should not look further at the record of results under the rule, in terms of programming or otherwise, is a narrowly limited viewpoint which we find unacceptable. . ." (29 P & F Radio Reg.2d 1715, 1734).

** The Economist stated: "I don't know of a single company that has gone into business as a result of the rule" (A 497).

perhaps four years is not a sufficient test for PTAR (¶ 18). It thus speculates that it is not yet an economic certainty that nothing better will ever conceivably emerge or that stations will always prefer inexpensive game shows and double commercials. Last year the FCC said that there is always the "possibility" that stations "may be persuaded ... to pay prices higher than those they are now paying"* and that conditions "might" improve.** But four years is more than enough time, particularly when experimenting with precious First Amendment rights. Such rights cannot be sacrificed any more by conjecture as to remote "possibilities" and "mights". CBS v. DNC, supra, 412 U.S. at 126-27.

A year-by-year review of PTAR over the past four television seasons (A 379-80) and harbingers as to next season (infra, p. 27-31) show that the economic imperatives of the marketplace, not any other factor, dictated the access programs which were telecast and will continue to be telecast under PTAR.

It is significant to contrast the PTAR I and PTAR III Reports. In 1970, the FCC affirmatively predicted that PTAR would create diversity. But it now makes no predictions at all.

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* 44 F.C.C.2d at 1138.

** FCC Brief, April 1, 1974, at 19 (in NAITPD case).

Instead, it argues that the burden of proof has somehow shifted to PTAR's opponents to prove a negative -- namely, that the four-year trend of sharply declining diversity will not inevitably continue.* That is clearly an improper legal standard for an administrative agency charged with the mandate to promote the "public interest" for millions of American viewers. The FCC itself must affirmatively find that its rules will promote the public interest and improve the lot of viewers, as pointed out in the NAITPD opinion (502 F.2d at 257). Indeed, last year the FCC itself recognized this fundamental rule of law. It stated that "no governmental restraint of this character is legal or appropriate except if and to the extent that it can be justified by a significant public benefit" (29 P & F Radio Reg. 2d at 1732). It then added:

> "the significant benefit mentioned need not be immediate and probably it need not be entirely tangible or quantifiable . . . but it must be substantial and, if not immediate, probable or quite likely to occur; and it must be public" (ibid; emphasis added).

But now, in contrast to 1970, the FCC is unwilling to predict

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* See FCC expression of this argument in the present Report (¶ 19) and in 1974 Report 44 F.C.C.2d at 1137-38.

that diversity is "probable or quite likely to occur". The four-year track record makes such predictions impossible.

Four years is enough experimenting. As Commissioner Robinson stated in his dissent (at 9):

> "One does not have to drop an egg on a hard floor a dozen times to learn that it will break. With a modest knowledge of eggs and hard floors even a single drop seems superfluous."

In conclusion, the PTAR idea has back-fired. In practice, it has frustrated the right of the public to the maximum variety of programs in violation of the First Amendment (while simultaneously invading the free speech rights of producers and broadcasters). The record of four years of access programs stands undisputed. There is no basis for the FCC's narrow decision to continue rather than to repeal PTAR. The FCC cannot experiment endlessly in sensitive areas of free speech.

II

THE NEW CLASSIFICATION SYSTEM OF PREFERRED AND TABOO PROGRAMS VIOLATES THE FIRST AMENDMENT, THE EQUAL PROTECTION CLAUSE, AND THE ANTI-CENSORSHIP PROVISION OF THE COMMUNICATIONS ACT

The Commission, as we shall demonstrate, has now set up a crazy-quilt of preferred and disfavored program categories as the condition for continuing PTAR. This classification system violates the First Amendment, the Equal Protection Clause and the Communications Act. Moreover, the vagueness of some of the categories will involve the Commission in more ad hoc judgments as to individual programs based on subjective qualitative evaluations, as in its past discredited waiver practice. This new regulatory scheme will intrude the agency more deeply and more improperly into sensitive areas of free speech.

The majority of the Commission was willing to continue PTAR but only if it could prop-up the rule with new classes of favored and disfavored programs. Indeed, it warned that it would repeal PTAR unless this Court sanctioned this new maze of regulations. It declared: "If we did not believe that we had the authority to make these modifications, we would then give further consideration to the advisability of continuing the rule" (¶ 48).

These new proposals involve wholesale regulation of programming and scheduling never contemplated by Congress or by the First Amendment. We shall now review some of the new rating system.

The Program Categories

(1) Preferred Game Shows: They are now acceptable in all 14 access half hours, even though they preempt 66% of access time devoted to syndicated programs and are more and more often merely sixth or seventh episodes of five-times-a-week network daytime shows.

(2) Disfavored Television Drama and Comedy Series: Television drama and comedy series, if they ever appeared on a network (although usually produced and owned by independent non-network producers), are forever banned in access time on affiliated stations (¶¶ 49, 59). Thus, Lassie, The FBI and I Love Lucy are contraband. But cheap replications of Bowling for $$, Let's Make A Deal and The Price is Right are favored.

(3) Preferred Lawrence Welk and Hee Haw: Duplications of these old hour-long variety shows, which formerly played on the networks, are preferred. The FCC warns stations to keep Saturday night open for "hour-long access programs" in preference to children's specials, public affairs

or documentaries (¶ 34). The Commission is obviously referring to Welk and Hee Haw, which are the only "hour-long access programs", and which now occupy Saturday night in most access markets. In contrast, last year the FCC stated that it thought that Saturday night would be ideal for network or off-network children's programs, documentaries and public affairs (44 F.C.C.2d at 1131). As a result, a great many were prepared for broadcast (¶ 6). But they are now banned from Saturday to assure a spot for Hee Haw and Welk (¶ 34).

(4) Some Preferred International Sports Events and Football Bowl Games: A station may present certain network sports programs in access if such athletic contests last approximately four hours (¶ 55). But not all such sports. The FCC specifies "international sports events (such as the Olympics)", and "New Year's Day college football games" (¶ 2). The FCC will not have to decide which other sports events fit into this "such as" category and which do not.

( ) Some Preferred Truly Special Programs: If the FCC decides that a network program is "of a special nature" (¶ 2) -- that it is "truly special" or "unusual" (¶ 55) -- a station may present it in access time if it occupies approximately four hours, provided that it is not a long motion picture. The Commission specifically states

that The Ten Commandments is precluded (44 F.C.C.2d at 1144). On the other hand, it has ruled that Miss America is a "special event" (44 F.C.C.2d at 1092).

(6) Certain Preferred Children's Programs: Stations may present a network or off-network program in access time if the FCC decides that it is designed for children ages 2 through 12, but not for family audiences consisting of those youngsters' parents (¶¶ 30-31). It is suggested that such programs should have "educational" value (¶ 31). But stations must keep such programs to a bare "minimum" and the networks must also cancel prior plans to present this type of material on Saturday night (¶¶ 6, 34). There is already a lively debate as to what programs the FCC will decide qualify as "children's programs" for ages 2-12, with "educational" value. The FCC has already approved The Wonderful World of Walt Disney (n. 25), but raised questions about Disney's Mickey Mouse Factory (n. 24). There is also uncertainty about the status of Black Beauty, Lassie and Circus (n. 24). Charlie Brown is probably acceptable (44 F.C.C.2d at 1134).

(7) Certain Favored Documentaries: Stations may present a network or off-network program in access time if the FCC decides that it is a documentary which is "nonfictional" and has "educational or informational" value, but not documentaries "relating to the visual

entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself" (¶¶ 2, 28, 33). But stations must keep such programs to a bare "minimum" and prior plans to present such programs on Saturday night are ordered cancelled (¶¶ 6, 34). The FCC has already decided that all documentaries about animals are acceptable (¶ 33). But Black Beauty and Lassie cannot qualify in this category because they are fictional. There is also apparently some question about the animals in Circus (n. 24).

(8) Some Preferred Public Affairs: Stations may present a network or off-network program in access time if the FCC decides that it is a "public affairs" program, which is not defined (¶ 32). But stations must also keep this to a bare "minimum" and cancel prior extensive plans to present such programs on Saturday night (¶¶ 6, 34). While some forms of public affairs qualify in this category, it apparently excludes motion pictures dealing with public affairs -- whether it be The Story of Miss Jane Pitman or The Sorrow and the Pity or State of Siege.

(9) Banned Motion Pictures: Beyond that, all motion pictures are forbidden if they ever played on a network; they are all acceptable if they never played on a network (¶ 50). The most popular features generally play

on the networks; the least popular do not. In other words, My Fair Lady is forever banned from access on affiliated stations; Tugboat Annie is forever welcomed.

This classification system of acceptable and forbidden programs -- the sine qua non for continuing PTAR according to the majority opinion -- constitutes a massive assault on the most fundamental First Amendment rights. It also constitutes the most pervasive attempt at FCC intrusion into the sensitive area of programming. There has never before been anything like this in our system of government.

These new program rules, among other things, show a particular bias against motion pictures and dramatic and comedy television series. Yet, such films are entitled to full protection under the First Amendment. Jenkins v. Georgia, 418 U.S. 153 (1974); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). The FCC throughout its Report assumes that the fictional treatment of subject matter in dramatic or comedy form is somehow less important or edifying than non-fictional treatment. But the FCC may not decree how our children and adults are to learn -- whether by a so-called educational documentary that may be boring and attract small audiences or by a dramatic presentation or satirical comedy that may well have a greater emotional impact on large audiences. Nobody, fortunately, told Shakespeare to

write only non-fiction. For it is a cardinal principle of Constitutional law that "[w]hat is one man's amusement, teaches another's doctrine". Winters v. New York, 333 U.S. 507, 510 (1945).

The FCC's bias is disclosed by its repeated statements that certain of its preferred categories (children's programs, documentaries, and public affairs) are justified because PTAR has discouraged programs of this type and that the public has a right to greater diversity of such programs (¶¶ 21, 29-33). But PTAR has also discouraged program diversity in other areas: dramas have declined from 46% to 5% in access time and comedies have declined from 22% to 0.5%. Yet, the FCC shows no similar solicitude for these programs. The Commission thus wishes to make a choice for the American people as to what is important and worthwhile for them to see -- what is in their best interest. Such a philosophy sets the bureaucracy on a dangerous path. Fortunately, the Founding Fathers barricaded this path by the First Amendment and Congress by the Communications Act.

The FCC's Classification System Violates the First Amendment and the Anti-Censorship Provision of the Communications Act

The Communications Act provides:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326.

In Mt. Mansfield, this Court stated:

> "The . . . legislative history is that Congress did not want the Federal Communications Commission to become a censoring agency." (442 F.2d at 480)

And the First Amendment forbids it. Thus in Red Lion, the Supreme Court explained that with respect to the rules then under consideration "[t]here is no question . . . of the Commission's refusal to permit the broadcaster to carry a particular program. . . . Such [a question] would raise more serious First Amendment issues" (395 U.S. at 396).

Similarly, in CBS v. DNC, the Supreme Court declared:

> "By minimizing the difficult problems involved in implementing such a right of access, the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment -- the risk of an enlargement of Government control over the content of broadcast discussion of public issues. See, e.g., Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951). This risk is inherent in the Court of Appeals' remand requiring regulations and procedures to sort out requests to be heard -- a process involving the very editing that licensees now perform as to regular programming. Although

> the use of a public resource by the broadcast media permits a limited degree of Government surveillance, as is not true with respect to private media, see National Broadcasting Co. v. United States, 319 U.S. at 216-219, the Government's power over licensees, as we have noted, is by no means absolute and is carefully circumscribed by the Act itself.
>
> * * * * *
>
> "Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.
>
> "Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed. The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result" (412 U.S. at 126-27) (footnotes omitted).

The Commission's preferred and taboo program categories, and its warning to keep certain programs to a "minimum" and not to use certain nights, constitute impermissible FCC invasion into sensitive areas of programming contrary to our American system of broadcasting and the First Amendment. CBS v. DNC, supra; Red Lion, supra; National Broadcasting Co., Inc. v. FCC, 31 P & F Radio Reg.2d 551 (D.C. Cir., Sept. 27, 1974)*; New Jersey State Lottery Comm'n v.

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* The D.C. Circuit has granted rehearing of this case en banc.

United States, 491 F.2d 219 (3d Cir. 1974), cert. granted, 42 U.S.L.W. 3652 (May 28, 1974)(No. 73-1471); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 63 (D.C. Cir. 1972) (Bazelon, Ch. J., dissenting), cert. denied, 412 U.S. 922 (1973); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969).

The FCC Regulations Create Arbitrary Classifications In Violation of the Equal Protection Clause

Moreover, since the FCC has set up arbitrary classifications which are not "reasonably related to the purposes" of the Commission's enabling legislation, the rule violates the Equal Protection Clause of the Fourteenth Amendment. Morey v. Doud, 354 U.S. 457, 465 (1957). Particularly in the sensitive free speech area, government cannot arbitrarily discriminate against those things it does not favor. Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Cox v. Louisiana, 379 U.S. 536 (1965); Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951).

The Regulations Are Unconstitutionally Vague

The program standards are also impermissibly vague under the First Amendment (e.g., the debate about what is a children's program, or a "truly special" program, or a

documentary of "educational" value). Vagueness has a particularly "chilling effect" in First Amendment areas on speakers and listeners and sets the censor adrift on an uncharted sea. In Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968), the Supreme Court upset a motion picture classification system that was vague, noting that it constituted "nothing less than a roving commission". The Court added (at 688) that "[v]agueness and the attendant evils . . . are not rendered less objectionable because the regulation of expression is one of classification rather than suppression." The Court has consistently held that "standards of permissible statutory vagueness are strict in the area of free expression." NAACP v. Button, 371 U.S. 415, 432 (1963); accord, Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961); Smith v. California, 361 U.S. 147, 151 (1959).

Past FCC Administration of PTAR Demonstrates That the Classification System Will Require Unconstitutional Waivers and Interpretations

The First Amendment infirmities of the new classification system are dramatically illustrated by the Commission's own past practice of granting or denying applications for waivers of the "off-network" provisions of PTAR -- a

practice which the FCC itself now concedes involved an improper "evaluation of 'program quality'" (44 F.C.C.2d at 1135). Thus, the Commission waived the "off-network" restriction for factual nature shows (Wild Kingdom and National Geographic) but not for fictional nature programs (Lassie).* Then Chairman Burch, in his dissent in the Lassie case, pointed out the dangerous course upon which the FCC had embarked:

> "The more the Commission interprets and implements the prime time access rule, the less sense it makes.
>
> "With the decision in 'Wild Kingdom' on the books, the Commission now rules that 'Lassie' is somehow a beast of a different color. The majority relies principally on the distinction that 'Lassie' is 'fictionalized entertainment' whereas 'Wild Kingdom' is a 'factual presentation' (p. 3 of Commission ruling) -- and I almost hope my colleagues do not mean to be taken seriously about this. The only conceivable basis for such a distinction is that they approve of 'Wild Kingdom' and regard 'Lassie' as less worthy. In short, they are making a backhanded qualitative programming judgment which, in my view, lies wholly beyond their authority and (because it is back-handed) fails on grounds of candor as well." 35 F.C.C.2d at 761. (Emphasis added.)

PTAR III's classification system will necessarily involve more and more bureaucratic interference in program decisions contrary to the First Amendment. Aside from the per se unconstitutionality of the new labyrinth of preferred

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* 33 F.C.C.2d 583 (Wild Kingdom); 25 P & F Radio Reg.2d 731 (National Geographic); 35 F.C.C.2d 758 (Lassie).

programs and the blacklisted programs, the new rules will surely invite a constant flood of requests for interpretative rulings and waivers requiring more subjective judgments by the censoring agency.*

Former FCC General Counsel Pettit, who resigned shortly after the passage of PTAR II, is reported to have made a statement last March that is even more appropriate today:**

> "'One thing I can say now,' he observed, 'is about the prime-time access decision. It was a compromise, pure and simple. The FCC members had no idea of how it would function when everybody voted for it at first. They didn't know what they were doing. That agency can get itself into very delicate situations.'
>
> "Mr. Pettit asserted the recent revision of the prime-time access rule is 'a dangerous, dangerous precedent' which 'puts the government in the position of using its judgment concerning the quality of programming.'
>
> "The revision, now before the U.S. Court of Appeals for the Second Circuit of New York, 'spells trouble for everyone, including the public,' Mr. Pettit said. 'The commission started out with all good ends in mind, and ended up with infringements of the First Amendment. It bothers me.'"

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* The FCC must always consider waiver requests. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

** Broadcasting, March 18, 1974, pp. 47-8.

III

THE MOTION PICTURE AND OFF-NETWORK BANS VIOLATE THE FIRST AMENDMENT, THE EQUAL PROTECTION CLAUSE, AND THE ANTI-CENSORSHIP PROVISION OF THE COMMUNICATIONS ACT AND ARE ARBITRARY AND CONTRARY TO THE PUBLIC INTEREST

The FCC now proposes to ban a motion picture in access time if it ever played on a network -- i.e., the most popular motion pictures. It justifies this new rule on the theory that it will "ease the administration" of PTAR (¶ 50). The notion that the Commission should ban the most popular motion pictures for "ease of administration" is shocking.

Indeed, the FCC throughout its present Report singles out both motion pictures and "off-network" television programs for discriminatory treatment which violates, not only the First Amendment and Equal Protection Clause and the anti-censorship provisions of the Communications Act, but also the public interest. Indeed, these provisions flout the original goals of PTAR. Such programming material constitutes broad categories of the most diverse entertainment. And unrestricted use of such material by local stations tends to counteract to some degree network dominance.

The FCC's discriminatory treatment of this rich body of material in preference for game shows cannot be defended in terms of the Constitution or the Communications Act. Moreover,

as shown below, the FCC has constantly changed the motion picture and "off-network" bans in a game of musical chairs that deflates any pretext of administrative expertise.

The Motion Picture Ban

The FCC has been totally inconsistent in its treatment of motion pictures. The ban changes each fall like the autumn leaves. PTAR I banned features from access time if they had been shown within the prior two years by a local station. In contrast, PTAR II allowed all motion pictures in the 7-7:30 PM period, a change which the FCC viewed as a "relaxation" required by the public interest.* But now, only a year later, PTAR III bans all motion pictures in all access time (7-8 PM) if they ever appeared on a network. No cogent rationale is given for these constant changes -- all unconstitutional.

Since the most popular motion pictures generally play on the networks, this year's ban shuts them out of access time

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* The FCC stated in changing the motion picture provision in PTAR II:

> "There appears to be merit in the arguments, by opponents of restrictions, that the present rule unduly restricts licensees in the selection of movies they believe desirable (whatever their origin or last telecast), and that stations should be able to present a movie fairly often during prime time in order to recover its high cost, if their judgment so indicates." (44 F.C.C.2d at 1136).

on affiliated stations and, instead, gives totally free access to the least popular films. This makes no sense in terms of any "public interest" standard.

A large portion of the public misses the network telecasts of even the most outstanding motion pictures -- whether it be Sound of Music, Patton or A Man For All Seasons. Now, those popular films cannot be shcwn by local affiliates in access time simply because they once played on a network (even though they were made independently of the networks). In practical effect, such popular films -- if licensed at all by local affiliates -- will be relegated to the morning, the early afternoon or very late at night, when most working people cannot see them.*

The present Report deals with the motion picture ban in a cryptic paragraph (¶ 50). It states that the movie rule was changed because:

> "We believe that this will ease the administration of this portion of the rule for licensees, motion picture distributors, and the Commission."

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* While PTAR III's ban applies to 7-8 PM, its practical effect is much greater. Stations cannot be expected to commence films at 5 ot 6 PM because they would run into periods traditionally reserved for news. Nor can they be expected to start their own features between 8-11 PM, which is network prime time. Prior to PTAR, stations often preempted some network programs for popular motion pictures which they had licensed directly from distributors. But PTAR discouraged that practice because stations, as the FCC found (¶ 23), rarely preempt programs in the shorter network schedules caused bv PTAR.

But this assumes the need for a movie ban in the first place. Moreover, the FCC nowhere identifies any alleged problem requiring a so-called "ease [of] administration". And if it had, such an alleged ease of administration would not be a ground for sacrificing First Amendment rights. Miller v. California, 413 U.S. 15, 29 (1973); Jacobellis v. Ohio, 378 U.S. 184, 187-88 (1964) (opinion of Brennan, J.).

Finally, the FCC states that the new change in the motion picture rule is designed to decrease the injury to producers caused by PTAR I and "is consistent with the goals of limiting network dominance" (¶ 50). Those unexplained conclusions defy logic. Banning the most popular motion pictures will cause the most injury to producers and further depress the feature syndication market already eroded by PTAR. And far from weakening network dominance, the new rule restricts producers to the triopoly network market, because the licensing of films to affiliates is prohibited after network use. The rule, in effect, gives the networks the power to determine which motion pictures will be left over for local affiliates.

The Off-Network Ban

The off-network ban has also been subject to mercurial changes each year. This merely highlights the artificial and irrational nature of this discriminatory ban under the Constitution and in terms of the FCC's "public interest" mandate.

The FCC, after passing the off-network ban as part of PTAR I in 1970, apparently soon had second thoughts. Thus, its 1972 Rule-Making Notice (37 F.C.C.2d 900) admitted that "it is questionable whether the [off-network] rule if literally applied would serve the public interest" (at 905); that the rule is a "bar on the presentation of some highly worthwhile material" (at 917); and that the off-network ban does not represent "the objective of the rule to lessen network control of television programming" (at 917).

Accordingly, last year the Commission removed the off-network ban from 7-7:30 PM on the ground that it was not justified (44 F.C.C.2d at 1132, 1142-43). It found that this time period under PTAR "represents singularly little in the way of opportunity for the development of really new syndicated material"; and that "stripped game shows have increased their share of the time by the elimination of stripped off-network shows such as I Love Lucy and Dragnet" (44 F.C.C.2d at 1132). The FCC added:

> "We do not view a contest between stripped game shows and stripped off-network material as one the Commission can profitably get into . . . Thus, in this respect, it appears that maintenance of the rule's requirements with respect to the first half-hour would be a restraint without sufficient justification." (Ibid.)*

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* On reconsideration, the FCC elaborated on the public interest reasons for allowing "off-network" programs back into the first half-hour of prime time (29 P & F Radio Reg. 2d [footnote continued]

Now, only a year later, with even more game shows in access time, the FCC does an abrupt about face and reimposes the "off-network" ban for the entire 7-8 PM period without any cogent explanation. It simply concludes:

> ". . . it appeared to us earlier that there is something to be said for increasing diversity by permitting off-network material in addition to news and game shows which generally fill this period Monday-Friday. As a short run proposition, this might be true. However, for the longer term, we conclude that this would have too much of an impact on the availability of cleared prime time for the development of new material, and that this might tend to increase the use of stripped game shows in the second half-hour of prime time." (¶ 59)

This overnight flip-flop in position is not supported by any rational explanation.* The NAITPD opinion requires the

[footnote continued]

1715, 1733). The FCC stated:

> "As to Monday-Friday, this was done because these periods produce singularly little in the way of support for new non-network material, being devoted by 90 percent of the stations subject to the rule either to news or to stripped game shows most of which were on TV, and to some extent in prime time, before the rule. Also, this is a period as to which there is no network pressure to clear time (assertedly a restriction on licensee freedom of decision) because the networks have not programmed this time. This being the case, it appears that the restriction serves little more than as a limitation on licensee freedom of choice in exercising his program responsibility -- which Frank emphasizes as one of the main objectives of the rule." (29 P & F Radio Reg. 2d at 1733.)

* It is also illogical and unfair to penalize "off-network" programs at 7-7:30 or at any time because the FCC fears that there might be more stripping of game shows at other times.

FCC to "identify the public interest basis for its actions" (502 F.2d at 257). Here, the FCC fails to explain why the public interest as to "off-network" shows has changed so drastically since 1974.

Moreover, the entire "off-network" theory, in practice, has proven fictitious. PTAR bans an episode of Lassie which appeared on a network but, at the same time, promotes the sixth and seventh episodes of current stripped daytime network games produced at network facilities. What could be more "off-network"?

The "off-network" ban is particularly arbitrary today because, as this Court recognized in Mt. Mansfield, independent producers do not recover production costs from the network run of a series but must look to subsequent station syndication (442 F.2d at 485-6). The extent of such deficit-financing, imposed on producers by the networks, has grown extremely severe in part because PTAR has increased the network's bargaining leverage over suppliers (Point IV). Thus, the syndication market is more important today than ever for the health of independent producers. But PTAR curtails a substantial portion of that syndication market. The FCC has thus frustrated its own goals of fostering a healthy independent production industry. PTAR III will discourage risk investments in new projects because they will later be foreclosed from a significant share of the syndication market.

In conclusion, the motion picture and off-network bans, unconstitutional restraints and denials of equal protection, are particularly indefensible now in the light of four years' PTAR experience. The FCC's drastic changes in these rules every year show that they rest on quicksand.

IV

THE FCC FAILS TO MEET ITS STATUTORY MANDATE TO DECREASE NETWORK DOMINANCE. PTAR INCREASES THAT DOMINANCE CONTRARY TO ITS INTENDED GOAL

This Court in Mt. Mansfield stressed that one of PTAR's chief goals was to decrease network dominance (442 F.2d at 477). And in the NAITPD case, this Court repeated that the aim was "to combat" the network "stranglehold" and that "the nation's policy favoring competition is one which the FCC must incorporate in regulating the broadcast media" (502 F.2d at 251, 256). Moreover, the Court in NAITPD criticized the Commission for glossing over this issue and for disregarding the Pearce Report's finding that PTAR increased network dominance (at 256-57).

But, despite that criticism and despite its statutory mandate, the Commission continues to side-step this matter. Having passed PTAR to reduce network power, the FCC cannot continue a rule which has precisely the opposite effect.

Although designed as an anti-network measure, PTAR paradoxically is now supported by two networks (NBC and ABC). The third network (CBS), voicing philosophical objections, has in the past sought a delay of repeal. The reasons for

the networks' change of position is clear. The detailed Pearce Report found that "[o]verall network power has been strengthened, not weakened, by the prime time access rule" (A 167).

PTAR, by shrinking network prime-time from 3-1/2 to 3 hours per night and from 4 to 3 hours on Sunday, reduced the prime-time schedules of the three networks from 75 to 63 hours per week. The Pearce Report found that this reduction of 12 hours, or 16%, created an artificial scarcity of network prime-time, thereby increasing the networks' leverage over independent producers of programs, stations and advertisers (A 203-11).

The FCC's present Report (¶ 23), after repeating the generalities of its criticized 1974 Report (44 F.C.C.2d at 1140), reluctantly accepts some of the Pearce Report's findings, but then inexplicably shrugs them off.

Advertisers: The FCC now appears to concede that PTAR has probably increased the network's leverage over advertisers (¶ 23) -- a fact admitted by ABC.*

Stations: The FCC now concedes (¶ 23) that PTAR has caused a decline in station preemptions and non-clearances in prime time (8-11 P.M.). But the Commission makes light of

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* ABC stated that PTAR's "cut-back to three hours per night has tended to firm up, or stabilize the market for network commercial positions." ABC's Principal Comments Before FCC, September 20, 1974, p. 18.

this fact, stating that there were never very many pre-emptions anyway. That comment is ironic because, as this Court pointed out in Mt. Mansfield, PTAR was passed when the option time rule failed to cure this very problem (442 F.2d at 480).

The networks also set the tone for access programming by affiliates (7-8 P.M.) across the nation because each network owns five key stations in the largest markets. NAITPD, other producers and the Pearce Report all recognize that advance commitments from those powerful network O & O stations are essential prior to the launching of most access programs (A 374-79, 391-93). The FCC's conclusion that support from those O & O stations is "important and sometimes vital" but not always "necessary" (¶ 23) minimizes the impact of the networks' significant influence over access time contrary to the undisputed record (A 374-79, 391-93).

Producers: Although PTAR was passed to promote a healthy program production industry to counteract network dominance to some extent, the FCC now appears to concede that PTAR backfired but then inexplicably walks away from this problem.

In 1970, when passing PTAR, the FCC stated that because of the three-network triopoly, "independent producers are seriously disadvantaged by the market structure" (23 F.C.C. 2d 382, 387); and that, with PTAR and its companion rules,

"the producer's ability profitably to operate in network television will be greatly enhanced" and their "bargaining position will be improved" (at 398). The Commission also noted that "the terms of market entry for the major motion picture corporations were on the whole less favorable than for the generality of packagers" (at 388). But far from helping the position of independent producers as intended, PTAR has increased network leverage over them. It has created an artifical scarcity of prime time; and the networks have used this leverage to drive prices further below cost.

The FCC deals with this issue in a series of ambiguous statements (¶ 23). The Commission initially finds (¶ 23) that "[a]s to the economic respects in which network control probably is increased, the relationships with . . . producer suppliers, the material set forth (pars. C-18, C-20-21) indicates that this increase in dominance is still an unresolved issue" (emphasis added). The Commission then refers to a trade-paper article* about the decrease of producers for network programs from 27 to 19 because of increased network leverage and adds:

> "As to the relations with producers, the situation may well be an undesirable one, as indicated by the article noted in Appendix C; but it is not at all clear how much this results from the prime time access rule, or would be changed by repealing it." (emphasis added)

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* Broadcasting, September 23, 1974 (A 597-99).

The Commission thus has presented a dilemma: first, it indicates that PTAR increases network dominance over producers, and then it states that it is not certain "how much" it does so.

To avoid this dilemma, the Commission concludes that perhaps it need not bother itself with this perplexing problem at all (¶ 23):

> "In any event, this particular situation is one which could be approached in other ways, such as the current Justice Department antitrust action (refiled December 10, 1974) or consideration of some restriction on network control and rental of production facilities."

But, as this Court emphasized in the NAITPD case, it is the Commission's duty to promote the "nation's policy favoring competition." That is especially so when an anti-network rule has turned out to be a pro-network rule.

The FCC's professed confusion about "how much" PTAR increases network dominance over producers ignores the law of supply and demand and the unanimous conclusion of every disinterested expert who studied this matter.

Thus, the Pearce Report found:

> "Network control over the program production industry was strengthened, not weakened, by the prime-time access rule in a very important respect. The network's bargaining position with Hollywood program production houses was strengthened because the market for expensive television programming had been reduced by roughly 16 percent without any commensurate reduction in the number of production houses. . . ." (A 204)

Similarly, the Coleman Report, which is referred to by the Commission (at C-11 n. 7) concludes:

> "The reduction in time [by PTAR] caused a supply-demand imbalance in favor of the network vis-a-vis the program producers" (A 547).

* * *

> "While the producers have absorbed as much if not more of recent cost increases than the networks, due partly to the change in the supply-demand balance occasioned by the access rule, it is questionable how long this can go on" (A 547).

The recent Tucker-Anthony Report, The Television Programming Industry, January 1975 (A 559-96), updating the early report by that firm cited by the FCC (at C-11 n. 7), also points to PTAR as contributing to the networks' increased leverage over producers "to keep prices at abnormally low levels" (A 561-63). It adds that "few, if any, of the suppliers break-even with the license fees they receive from the networks"; "that producing television programs is an unprofitable operation"; and that if this deficit financing by independent producers continues, "we would expect a number of program suppliers to withdraw from the industry" (A 590). Several major producers are withdrawing from producing programs for the networks, including GE Tomorrow and Metromedia (A 590).

Finally, the Office of Telecommunications Policy of the President, which made its own economic study, stated in its recent comments before the FCC:

> ". . . by constricting artificially the amount of network prime time, the rule appears to have strengthened the networks' position and weakened the U.S. program production industry, contrary to its original objectives. . . . There are enough anticompetitive forces at work in TV without the Government adding more." (A 529).

Thus, despite the FCC's vacillating statements, PTAR has surely increased network power over independent producers.

As a result of PTAR and "the inclination of the networks to engage in predatory and restrictive trade practices" (Columbia Pictures Industries Inc. v. American Broadcasting Co., 501 F.2d 894, 900 (Lumbard, J. dissenting)) the viability of the independent television production industry is in jeopardy. See e.g., The New York Times, October 17, 1974; Broadcasting, September 23, 1974, p. 15 (A 473-74, 597-99).

Commissioner Robinson sums up the situation in his dissent (p. 1):

> "The Commission's continued struggle with 'network dominance' has been an adventure fully worthy of Don Quixote. . . The intent has been noble, but the results have left the Commission, like its famous precursor, with a doleful countenance. As often as not it has missed the giants and jousted with windmills."

At least two of the three giants now support PTAR. In a similar vein, former Chairman Burch stated last year in his separate statement in connection with PTAR II:

> "Because today's action might have been worse, I concur in it -- but with one proviso: Any notion that the rule, with or without the modifications adopted here, represents a serious attempt to come to grips with network dominance of the television programming market is a myth. How much better it would have been had the Commission expended a comparable amount of its resources and talents on sober study and rational action dealing directly with the fundamental problem.
>
> "That was the Commission's responsibility in 1970. It still is." (44 F.C.C.2d at 1168)

The Commission refuses to explore direct and viable solutions to the network dominance problem, suggested by Commissioner Robinson (at 29-34), former Commissioner Johnson (37 F.C.C.2d 900, 925-32), former Commissioner Burch (23 F.C.C.2d 382, 411-16; 44 F.C.C.2d 1172), its Economist (A 176-180), OTP and others -- proposals for creating additional networks, for rectifying the structural and other factors leading to network dominance and predatory practices, and for developing other competing media such as cable and subscription services. The refusal of an administrative agency to consider meaningful alternatives to problems within its statutory mandate has been criticized by this Court in other cases. See Scenic Hudson Preservation

Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

The FCC's decision to continue PTAR is contrary, not only to the aim of the rule, but to the Commission's statutory responsibility.

V

THE FCC'S NEW RATIONALES FOR PTAR DO NOT SOLVE THE RULE'S FIRST AMENDMENT VIOLATIONS OR CURE ITS OTHER ADVERSE EFFECTS CONTRARY TO THE PUBLIC INTEREST: INDEED, THE NEW RATIONALES RAISE SERIOUS ERRORS OF LAW AND EXCEED THE FCC'S STATUTORY MANDATE

There is no way to justify PTAR's invasion of First Amendment rights, or its decrease in diversity of programs, or its increase of network dominance. Nevertheless, we shall briefly review some of the new rationales now advanced by the FCC majority for continuing PTAR. Since the rule defeated its original aims, the FCC has attempted to invent new ones. PTAR has now become a rule in search of a rationale.

De Minimis Local Programming

The Commission majority advances local programming as the principal new reason for continuing PTAR (¶¶ 15, 32, 60).

But when the FCC conceived the rule in 1970, it mentioned locally-produced access programs in only a footnote (23 F.C.C.2d 382, 395 n. 37) and recognized that stations would generally rely on syndicated programs (25 F.C.C.2d 318, 328).

In any event, any increase of local programs in

access time is de minimis and not proven to be attributable to PTAR as opposed to other factors, such as increased pressure from community groups. Thus, the FCC itself finds only 7% of access time was devoted to local programs (App. D p. 2) and that "[i]t may be that these programs in some cases would have been presented anyhow" (¶ 15). Former Commissioner Cox (now representing a game show distributor) finds only 2% local public affairs in access time.* And the Pearce Report found that only 4% of access local shows were not in existence prior to PTAR (A 233).** The Report concluded:

> "To date, there has not been a great impact from locally produced public affairs programs." (A 233)
>
> * * * *
>
> "There are . . . considerable disincentives to producing such local public affairs programs, while there are considerable incentives to buy cheap game shows with high viewer appeal and high revenue and profit potential."*** (A 232)

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* Principal Comments of Sandy Frank before FCC, September 20, 1974, Ex. F (A 527).

** The Pearce Report found 91 half-hours of new local shows (A 233) in the 2,100 total access half-hours under PTAR (A 329).

*** As the Pearce Report found, local programs are more expensive to produce than to license a game show, and attract fewer advertisers or viewers (A 229-33).

Indeed, each of the top two games shows alone occupy more time than all local shows on all affiliated stations in all markets in all access time.*

PTAR cannot be continued on the Commission's new rationale that it facilitates some local programming. Whether it facilitates 2% or 4% local programming, it does so at the price of decreasing the overall diversity of programs in the vast bulk of access time for millions of Americans. If the FCC wishes to encourage more localism, it must consider constitutional measures geared precisely to that purpose. As Commissioner Robinson points in his dissent (p. 26): "The Commission ought to be able to design a better method of enforcing licensees' obligations to the public."

The FCC's new localism rationale -- its major rationale today -- clearly suffers from overbreadth under the First Amendment.

The Supreme Court has declared:

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose ..." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

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* Compare Report, App. D, p. 2 with A 432.

To same effect, see United States v. Robel, 389 U.S. 258, 265-66 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); NAACP v. Alabama, 377 U.S. 288, 307 (1964); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938).

Profits to Networks and Affiliates vs. Injury to Independent Stations

The NAITPD opinion warned that the FCC "must place the public interest above private interests" and indicated that the 1974 Report smacks of an "impermissible compromise" between different broadcasting groups (502 F.2d at 257-58 & n. 15). But one of the new rationales which the FCC now gives for PTAR (¶ 15) is that the network affiliates make "more money" from the rule!

The Commission then suggests that affiliates can use these profits "to support local programming efforts" (¶ 16). But there is not a single finding by the FCC or a scrap of evidence in record that they do so.* Moreover, the notion that affiliates, trustees of the public airwaves under a statutory obligation to meet local needs, must be stimulated to do so by "more money" from game shows is the type of philosophy branded as "cynical" by this Court in Mt. Mansfield, 442 F.2d at 479.

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* The record is to the contrary. Thus, two of the nation's largest network multiple-station owners, who admittedly profit from PTAR, agree that "do-good-shows have failed miserably" in access: they prefer game shows even if they are not equal to the "Pieta." Wall Street Journal, November 24, 1972, p. 1.

Increased Commercialism

The FCC advances another new and "cynical" rationale. It states that PTAR offers advertisers more opportunities to advertise and this is more important than the impact on viewers (¶¶ 17, 23 n. 19, 58). PTAR programs carry almost twice as many commercials as the network shows they replaced (an increase from about 3 to approximately 6 commercial minutes per half hour). Game shows also often carry "hidden plugs" for products:

> "An average half-hour game show may have more than two minutes of plug-time in addition to the normal commercial load of six minutes . . . . There are more 'commercials' on game shows than on any other type of program." The New York Times, July 7, 1974, Sec. 2, pp. 1, 15.

* * * *

> "... [T]here has been a proliferation of game shows which not only fail to serve local needs or increase program diversity, but are actually detrimental to the public interest. Such programs intertwine commercial promotion and program matter and effectively increase commercial content during the access period to far above any acceptable standard." Consumers Union, Comments before FCC, September 20, 1974, p. 3.

The impact of this increased commercialism falls particularly heavily on children, who form a substantial segment of the early evening access hour. In its recent much-publicized Children's Television Report and Policy Statement (31 P & F Radio Reg.2d 1228) the Commission

expressed strong concern about excessive commercialism and hidden "plugs." Yet now, it justifies PTAR as an advertising vehicle. This view, apart from contradicting its Children's Report, hardly jibes with its statutory "public interest" mandate.

Two Access Distributors

The Commission advances another new rationale for PTAR: it alleged that the rule created two new minor distributors (Viacom and Worldvision) who now finance network programs, thereby increasing the number of network producers (¶ 17). This flouts the record. Those two companies are not creatures of PTAR, but spin-offs of the CBS and ABC syndication arms caused by the FCC's anti-syndication rules.* Their emphasis in access is on game shows.

Access Programs on the Shelf

Finally, the FCC offers another new rationale for PTAR: The rule is good if it leads to the creation of more programs, even if affiliates never broadcast them but flood access time with inexpensive game shows which decrease diversity.

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* There is also no FCC finding or evidence in the record that the number of network producers increased or that those two distributors played a role in any such alleged increase.

Thus, the Commission claims that PTAR has developed "a body of new" syndicated programming (¶ 16) and attaches a list of 50 (Appendix D). But most played in only few markets, and hardly any qualify as "new". Indeed, twenty-two of those programs presently preempt almost 90% of access time devoted to syndicated entertainment and they are additional episodes of current daytime stripped network shows or replication of old network shows. Appendix B included herein describes those twenty-two programs seen in most access time.

The FCC's present indiscriminate reliance on a laundry-list of programs -- whether or not seen by the public -- is an approach which the Commission itself flatly rejected last year (44 F.C.C.2d at 1138 & n. 39):

> "As discussed in Appendix C, the 'majors' exhibits have not been questioned for accuracy using the assumptions on which they were prepared, and our staff's check indicates that they are approximately correct on the same assumptions. The proponents of the rule strongly criticized them, inter alia for emphasizing the access-period time devoted to particular programs, rather than the number of programs actually available for access-period use. We find this objection without merit. The greatest program on earth is of no value to the public unless some station will buy it and show it." (Emphasis added.)

And, when reviewing the access shows which left the shelf and actually filled the airwaves last year, the FCC repeatedly found that there was virtually nothing "new" for

viewers to watch (44 F.C.C.2d at 1132, 1138, 1154; 29 P & F Radio Reg.2d at 1733-34).

Thus, when all is said and done, the series of new rationales for PTAR are eleventh-hour arguments which lack merit. The real goals of PTAR were frustrated. The new ones are bogus.

VI

THE FCC OPINION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The rules governing actions by administrative agencies are summarized in this Court's decisions in the NAITPD case and Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). Those rules are violated by the Commission's adoption of PTAR III.

Although passed to increase diversity of programs, PTAR decreased diversity. Yet, the Commission now belittles this goal and professes perplexity in measuring diversity.

Although passed to decrease network dominance, PTAR increased dominance and at least two networks openly fight to keep the rule. Yet, the Commission now professes perplexity about dealing with the issue of dominance and continues what has become a pro-network rule.

Although this Court in NAITPD expressly warned the Commission against placing private interests above public interest, the Commission now does just that.

Although the Commission in 1970 eschewed any intention of promoting particular types of program (23 F.C.C. 2d at 397) and this Court in Mt. Mansfield warned against

the Commission becoming a "censoring agency" (442 F.2d at 480), the Commission is now willing to continue PTAR only if this Court sanctions a classification system of preferred and taboo programs that tramples First Amendment and Equal Protection rights.

Because PTAR defeated its two real goals, the Commission now abandons them and advances an assortment of brand new rationales which defy its statutory mandate.

While courts frequently defer to administrative expertise, they do not do so when an agency constantly contradicts its past policies and when its rules violate Constitutional safeguards and the agency's own statutory mandate. PTAR III does just that.

Conclusion

For all of the foregoing reasons, we respectfully request that the prime time access rule be invalidated.

Respectfully submitted,

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Dated: New York, New York
February 21, 1975

APPENDIX A

REACTION OF NATION'S LEADING CRITICS TO PTAR'S LACK OF DIVERSITY

". . . The rule has been a cultural disaster." (The Washington Post, 7/14/74)

* * *

"That slot [access time] has been monopolized by inane game shows and penny-budget disasters." (N.Y. Times, 9/14/72)

* * *

"As anyone but the half-dozen game show tycoons who regularly meet in a telephone booth to file petitions will admit, the experiment has been a dismal failure" (Los Angeles Times, 9/20/74).

* * *

"... The FCC was trying to jab the fat-cat operators of local stations across the country to do some useful community-interest programming. They didn't. Instead they bought a lot of game-show revivals, largely junk, from the worst days of TV" (New York Post, 9/19/74).

* * *

"Instead of promoting original programming, it [PTAR] has sent the local station managers scurrying to producers who imitate hits of the past." (Time, 2/5/73)

* * *

"A season and a half later, the rule has become a regulatory quagmire; almost wholly counterproductive as a creative stimulant, highly discriminatory in its industry impact, and hopelessly inflexible as a guideline." (TV Guide, 1/27/73)

* * *

"'Hee Haw.' 'What's My Line?' 'This Is Your Life.' 'Lawrence Welk.' 'To Tell The Truth.' That sounds like a list of television hits of yesteryear. It is. It is also a list of television hits of today, thanks to (some say by order of) the Federal Communications Commission." (Wall Street Journal, 11/24/72)

* * *

The severest critic of access shows is not one of the nation's leading TV critics but Chuck Barris, a leading producer of access game shows distributed by petitioner Frank. Barris was the subject of an editorial in TV Guide, August 10, 1974 (pp. 16-18, 20, 22):

"Speaking of Let's Make a Deal, The Price Is Right, and his own New Treasure Hunt, Barris says: 'These shows bring out the worst in human beings, and reduce them to a state that isn't very attractive to see. We make a strong appeal to the greed in them. They agonize, they cry, they hyperventilate. And we show all that. . . . It doesn't bother me that we show it, because I'm hypocritical and greedy enough myself to want to make money out of it. If I felt strongly enough about it -- which I don't -- I'd take my shows off the air.' Then he added, grinning: 'Somebody recently called me The King of Slob Culture.'

"Mr. Barris comes by his title honestly, for he is also the man who gave us The Newlywed Game and The Dating Game and it is sometimes difficult to decide which of these shows is slobbier than the other. But many of us are convinced that, in their weekly multimillion

contact with the American public, both do a steadily efficient job of cheapening our values, coarsening our mores and accustoming our young audiences to a kind of official tawdriness of social behavior. For bluntness, honesty and lack of a sense of social responsibility, Mr. Barris rates 100 per cent.

APPENDIX B

74-75 SEASON - TOP 22 ACCESS SHOWS (ACCOUNTING FOR 87% OF ACCESS TIME DEVOTED TO SYNDICATED PROGRAMS)*

TITLE	TYPE	% OF ACCESS TIME	NEW	TOTAL YEARS OF U. S. BROADCAST BEFORE PTAR
TO TELL THE TRUTH	GAME	11.5%	NO	17.3
TRUTH OR CONSE-QUENCES	GAME	11.0%	NO	18.1
HOLLYWOOD SQUARES	GAME	7.3%	NO	8.6
LET'S MAKE A DEAL	GAME	6.6%	NO	13.8
LAWRENCE WELK	VARIETY	4.8%	NO	20.5
HEE HAW	VARIETY	4.5%	NO	1.6
WHAT'S MY LINE	GAME	4.2%	NO	20.4
BOWLING FOR $$	GAME FORMAT	3.7%	NO	5.0
"NEW" PRICE IS RIGHT	GAME	3.7	NO	18.2
WILD KINGDOM	NATURE/ TRAVEL	3.4%	NO	9.3
"NEW" NAME THAT TUNE	GAME	3.3%	NO	6.0
"NEW" TREASURE HUNT	GAME	3.1%	NO	4.0
CONCENTRATION	GAME	2.7%	NO	16.0
CANDID CAMERA	MISCELLANEOUS	2.5%	NO	19.0
WILD WILD WORLD OF ANIMALS	NATURE/ TRAVEL	2.5%	NO	**
$25,000 PYRAMID	GAME	2.3%	NO	1.0
POLICE SURGEON	DRAMA	2.2%	NO	**
WORLD AT WAR	MISCELLANEOUS	1.9%	NO	**
JEOPARDY	GAME	1.9%	NO	9.5

* A 432-37

** Foreign network

TITLE	TYPE	% OF ACCESS TIME	NEW	TOTAL YEARS OF U. S. BROADCAST BEFORE PTAR
LAST OF THE WILD	NATURE/ TRAVEL	1.3%	YES	0
DEALER'S CHOICE	GAME	1.2%	YES	0
MASQUERADE PARTY	GAME	1.2%	NO	10
	Total	86.8%		

UNITED STATES COURT OF APPEALS

For the Second Circuit

WARNER BROS. INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA, INC., and TWENTIETH CENTURY-FOX TELEVISION, Petitioners, -against- FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, Respondents.	Case No. 75-4021 (Consolidated) AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MOSES SILVERMAN, being sworn, states that he is not a party to the action, is over 18 years of age, resides at 233 East 59th Street, New York, New York, 10022, and that on the 21st day of February, 1975, deponent served three copies of the within Brief and copies of the three-volume Appendix upon:

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the addresses designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Moses Silverman

Sworn to before me this
21st day of February, 1975.

Notary Public

FRANCINE NOVAK
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Commission Expires March 30, 1976